THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.10.2007

+ Crl MC 10078/ in BAIL APPLN. 4746/2006

MASROOR AHMED ... Petitioner

versus -

STATE (NCT OF DELHI) & Another ... Respondents

Advocates who appeared in this case:
For the Petitioner : Mr Jitendra Sethi
For the Respondent/State : Mr O.P. Saxena
For the Complainant : Mr Mohd. Tabrez and Mr Mashi Alam

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in Digest ?

BADAR DURREZ AHMED, J

1. This is a very unusual case. The petitioner was originally seeking bail [Bail Appln 4746/2006] in respect of FIR No. 817 dated 12.12.2006 registered at police station Preet Vihar under section 376 of the Indian Penal Code, 1860. The petitioner's bail application filed before the sessions court had been rejected by the learned Sessions Judge by an order dated 20.12.2006. Consequently, an application for bail [Bail Appln 4746/2006] had been filed before this court. During the pendency

of the said bail application, in which this court had granted interim bail to the petitioner, the complainant and the petitioner have arrived at a settlement which has been reduced to writing in the form of a compromise deed dated 01.09.2007. By virtue of the said deed, the petitioner and the complainant have decided to settle all their disputes and cases which include the present case as well as cases arising out of FIR No. 637/2006 u/s 498-A/406/34 IPC and FIR No. 79/2007 u/s 506/34 and the maintenance case u/s 125 CrPC pending before the Metropolitan Magistrate, all of which have been initiated by the complainant, and the case arising out of FIR No. 91/2007 at P.S. Tilak Marg u/s 506/34, which has been registered at the instance of the petitioner and in which the complainant herein, Aqil Ansari, Altamash and others are accused. The question of custody of the minor daughter [Sara @ Ushna], aged about 2 years, born out of the wedlock of petitioner and the complainant has also been settled. Because of this settlement/compromise between the petitioner and the complainant as also on merits, this application has been filed under section 482 CrPC for quashing of FIR No.817/2006 u/s 376 registered at P.S. Preet Vihar.

The Facts

2. The case is unusual, not because of the circumstances narrated above but, because of the facts which led to the registration of the FIR in

question. The complainant, Aisha Anjum, filed a written complaint at the above-mentioned police station on 12.12.2006. In her written complaint, she stated that her marriage was solemnised with the petitioner on 2.4.2004 in accordance with Muslim rites. She further stated that out of this marital relationship a daughter was born to her. She alleged that the petitioner and his family members threw her out of the house on account of non-fulfillment of dowry demands for which she had already complained to the crime against women cell. It was then alleged that the petitioner had filed a case for restitution of conjugal rights and on 13.4.2006, from the court itself, she went with her husband to their matrimonial home. It is further alleged in the written complaint that after her return to her matrimonial home her husband committed rape on her upto 19.4.2006 because she had later come to learn that he had already given her *talaq* earlier and that he had lied in court that she was still his wife and on this misrepresentation he had taken her home. She further submitted that the petitioner's family members also knew about the *talaq* but they participated in the fraud committed against her. It is further alleged that on 19.4.2006 a second *nikah* was performed which came to light only when she obtained a duplicate copy of the *nikahnama*. She alleged that the petitioner had unlawful relations with her during that time as he was not her husband then. She further stated that had she known, at

that point of time, that he was not her husband and that he had already given her *talaq*, she would never have agreed to have conjugal relations with him. She alleged that her consent was taken by playing a fraud upon her and that the petitioner, in the guise of being her lawful husband, had unlawful relations with her by deceitful means. She reiterated that had she known of the truth at that point of time she would never have given her consent. She therefore requested that legal action against the petitioner and other accused persons be taken under sections 376/34 IPC.

3. It is an admitted position that the complainant and the petitioner got married on 2.4.2004 and that they lived together till 8.4.2005. On that date, according to the complainant, she was thrown out of the house on account of non-fulfillment of dowry demands. But, according to the petitioner, the complainant left their house without informing him and of her own will. On 22.10.2005, the complainant gave birth to a baby girl (the said Sara @ Ushna, who is now about 2 years old). It is alleged by the petitioner that towards the end of October 2005, his brother-in-law and his sister attempted to arrange for the return of the complainant to her matrimonial home. But, this was in vain. It is further alleged by the petitioner that upon hearing of the failure of this mission, he became very sad and extremely angry and in this mental

condition, in the presence of his brother-in-law and another man, he uttered the words giving *talaq* to his wife (the complainant) approximately three times or even more. According to the petitioner, he forgot about this incident and continued to make efforts for the return of his wife. Admittedly, the factum of the purported *talaq* was not communicated to the complainant.

4. On 23.3.2006, the petitioner, wanting the return of his 'wife', filed a suit for restitution of conjugal rights in the court of the Senior Civil Judge, Delhi. In paragraph 1 of the plaint, the petitioner stated that the complainant was married to the petitioner on 2.4.2004 at Delhi and was "*still the wife"* of the petitioner. The purported *talaq* of late October 2005 was not mentioned in the plaint. On 13.4.2006, statements of the complainant and the petitioner were recorded in the said suit for restitution of conjugal rights. The complainant stated:-

> "I am ready to join the company of the plaintiff/ husband and from the court I am going to my matrimonial home with my husband."

The petitioner made the following statement:-

> "I have heard the statement of defendant. I am ready to take the defendant/ my wife to my home. My suit stand[s] satisfied and I do not want to pursue the present matter. My suit may be disposed of as satisfied."

On the basis of these statements, on 13.4.2006 itself, the learned Civil Judge passed the following order:-

> "It is stated that matter has been settled between the parties and defendant is ready to join the company of the plaintiff. Statement of parties recorded. In view of the same suit of the plaintiff is disposed of as satisfied. File be consigned to Record Room."

5. The complainant returned with the petitioner to their matrimonial home on 13.4.2006 from court itself. Thereafter, another remarkable event allegedly took place. As mentioned in the FIR, a second *nikah* was performed between the petitioner and the complainant on 19.4.2006. Which, according to the complaint, the complainant got to know only upon receiving a duplicate copy of the *nikahnama* from the *Qazi* who performed the ceremony. According to the petitioner, the second *nikah* was necessitated because after the settlement of 13.4.2006, he was reminded by his brother-in-law that he had already divorced the complainant by way of a triple *talaq* in october 2005. Faced with this situation, the petitioner, who did not want any illegitimacy in his marital status, allegedly sought an opinion from a *mufti* on 16.4.2006. The *mufti* reportedly gave a *fatwa* on 17.4.2006 that three *talaqs* pronounced in one sitting would be regarded as one *talaq-e-rajai* and, consequently, the petitioner could have taken back the complainant within the *iddat* period of three months. But, as that period had elapsed, the petitioner and the

complainant could renew their matrimonial relationship only by performing a fresh *nikah*. According to the petitioner, it is because of this *fatwa* that the second *nikah* was performed on 19.4.2006 which, according to the petitioner, was witnessed by the complainant's brother (Shahid Naeem) who also signed as a witness on the *nikahnama* (as also the compromise deed dated 01.09.2007). It was, of course, earlier alleged by the complainant that the factum of the *nikah* was not in her knowledge and came to light much later, before the CAW cell. According to her, signatures were taken on the pretext that the documents had to be filed in court as a formality.

6. After her return to the matrimonial home on 13.04.2006, the complainant continued to reside with the petitioner. Once again, there was discord between them and the petitioner pronounced *talaq* (again) on 28.08.2006. On 30.8.2006, the petitioner left the matrimonial home. Since then, she is residing at her parental home. On 6.9.2006, she filed a complaint before the crime against women cell. It is further alleged by her that during the inquiry it came to light that the petitioner had given her *talaq* earlier also (ie., in October, 2005). According to the complainant, on 3.10.2006 when the petitioner appeared before the CAW cell, he disclosed that he had already given the 'first' *talaq* to the

complainant in October 2005. It is then, according to the complaint, that the complainant came to know for the first time that a fraud had been played upon her and that the petitioner had sexual intercourse with her during 13.4.2006 and 19.4.2006 when, in law, he was not her husband. However, she filed her written complaint only on 12.12.2006 with regard to the alleged rape committed during 13.4.2006 and 19.4.2006. The FIR under section 376 IPC was registered on the same date (12.12.2006).

7. The prosecution case is that the sexual intercourse which allegedly took place between the petitioner and the complainant during 13.4.2006 and 19.4.2006 constituted rape under section 375 IPC as the complainant had been deceived into believing that the petitioner was still her husband on 13.4.2006, when the order in the suit for restitution of conjugal rights was passed. It is contended that the petitioner knew of the *talaq*, yet, he misrepresented that the complainant was still his wife and the complainant, believing this, returned to her matrimonial home. Her consent to re-establish the conjugal relationship was, therefore, based upon a fraud played by the petitioner and his family members.

8. It is pertinent to mention that the petitioner's bail application was dismissed by the learned Additional Sessions Judge on 20.12.2006

holding that the petitioner had not disclosed the factum of *talaq,* either to the complainant or to the court, in his suit for restitution of conjugal rights. It was further held that--

> "Pronouncement of triple 'talak' amounts to talaq-ul-Biddat which became irrevocable and it does not lie in the mouth of the applicant to say that the complainant was his wife. As far as case of re-marriage is concerned, there should be an intermediate marriage with some other person, consummation of marriage and then divorce and thereafter applicant can marry the complainant. Therefore, second marriage on 19.4.06 nowhere answers religious tenets of the parties. Consent, given by the complainant from 13.4.2006 till 19.4.2006, was a tainted consent, which can not be termed as free consent by her."

These observations in respect of muslim law as applicable in India are not correct. The foundation of the prosecution case as also the decision of the learned sessions judge is that the marriage stood dissolved by the purported triple *talaq* of October, 2005. On the contrary, as indicated below, the 'foundation' is illusory and is not supported by the facts stated in the complaint considered in the light of the principles of muslim law as applicable in India. This would be clear from the discussion below.

The compromise, Sections 320 and 482 CrPC

9. But, before that, let me deal with the issue of exercise of power under section 482 CrPC. The learned counsel for the petitioner

contented that this was a fit case for exercise of the power under section 482 CrPC so as to quash the said FIR No.817/2006 and all proceedings emanating from it. The learned counsel for the complainant also requested that in view of the settlement/compromise the said FIR be quashed. The complainant, who was also present, endorsed the submissions of her counsel and stated that she was not interested in pursuing the case. Consequently, the learned counsel for the petitioner submitted, there was absolutely no chance of a conviction. However, the learned counsel for the State submitted that the offence u/s 375 was not compoundable under section 320 CrPC and, therefore, the case cannot be extinguished merely because the complainant and the accused have settled. The learned counsel for the petitioner rejoined by submitting that the power under section 482 is not limited by section 320 CrPC and, in any event, even on merits this was a fit case for quashing as the offence of rape is not made out. He submitted that upon a proper application of muslim law, the *talaq* purportedly given by the petitioner to the complainant in October, 2005 would have to be held as invalid. Consequently, at the relevant time (ie., 13.04.2006 to 19.04.2006) the petitioner and the complainant would be husband and wife. Therefore,

no case of rape can at all be made out in view of the exception[1] to section 375 IPC.

10. Section 482 CrPC provides that:

> "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or other wise to secure the ends of justice."

The provision saves the inherent and plenary power of the High Court to do justice. The fact that section 320 CrPC does not in any way abridge the scope and amplitude of the power of the High Court for quashing an FIR, even in respect of an offence which is otherwise not compoundable, for securing the ends of justice, is no longer open for debate. In ***B.S. Joshi v. State of Haryana:*** ***(2003) 4 SCC 675***, the Supreme Court held:

> "We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power."

[1] "*Exception.* —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

In an earlier decision in the case of ***State of Karnataka v. L. Muniswamy:*** ***(1977) 2 SCC 699***, the Supreme Court explained the expanse of the powers of the High Court in the following words:-

> "In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

After referring to the said decision in ***Muniswamy*** *(supra),* the Supreme Court in ***B. S. Joshi*** *(supra)* observed as under:

> "… What would happen to the trial of the case where the wife does not support the imputations made in the FIR of the type in question. As earlier noticed, now she has filed an affidavit that the FIR was registered at her instance due to temperamental differences and implied imputations. There may be many reasons for not supporting the imputations. It may be either for the reason that she has resolved disputes with her husband and his other family

members and as a result thereof she has again started living with her husband with whom she earlier had differences or she has willingly parted company and is living happily on her own or has married someone else on the earlier marriage having been dissolved by divorce on consent of parties or fails to support the prosecution on some other similar grounds. In such eventuality, there would almost be no chance of conviction. Would it then be proper to decline to exercise power of quashing on the ground that it would be permitting the parties to compound non-compoundable offences? The answer clearly has to be in the "negative". It would, however, be a different matter if the High Court on facts declines the prayer for quashing for any valid reasons including lack of bona fides.

11. In *Madhavrao Jiwajirao Scindia* v. *Sambhajirao Chandrojirao Angre*[2] it was held that while exercising inherent power of quashing under Section 482, it is for the High Court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. Where, in the opinion of the court, chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may, while taking into consideration the special facts of a case, also quash the proceedings.

12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes."

(underlining added)

Thus, in matrimonial matters which take on a criminal hue, it would be quite in order to quash an FIR where the parties have settled and decided to bring to an end all their disputes. Apart from freeing the husband and

[2] (1988) 1 SCC 692

wife and their families from the rigours of long drawn legal battles, genuine settlements also reduce the burden on courts and the entire prosecution machinery from pursuing cases which would ultimately see a dead end. The ultimate chance of conviction is bleak, if at all, in such cases as the complainants would not support any of the imputations made in the complaint. A prompt an early end to such cases would certainly secure the ends of justice. Of course, since the powers of the High Court are plenary, the High Court must exercise them with circumspection.

On merits: submission that the offence u/s 375 IPC is not made out

11. The settlement between the petitioner and the complainant would in itself have been sufficient for this court to exercise its inherent powers to put to an end the FIR in question as also proceedings emanating from it. This is so because I am of the view that the parties have genuinely settled all their disputes and have decided to part with each other in terms of the compromise which brings to an end bitter legal matrimonial battles. The present case being one of them. It is also worth keeping in mind that the petitioner and the complainant have a daughter, who shall always remain their daughter even though they no longer remain as husband and wife.

Apart from this, it was also stressed by the learned counsel for the petitioner (and, not opposed by the learned counsel for the complainant) that on merits also no case for rape was made out. The learned counsel for the petitioner, submitted that-

(1) The alleged triple *talaq* of october 2005 did not result in a divorce in law. The *talaq* was invalid. And, it was not even communicated to the complainant. He relied upon the following decisions:-

(i) ***Riaz Fatima & Anr v. Mohd Sharif : 135 (2006) DLT 205;***

(ii) ***Dagdu Chotu Pathan v. Rahimbi Dagdu Pathan: 2002 (3) Mh.L.J. 602 (FB);***

(iii) ***Dilshad Begum Ahmadkhan Pathan v. Ahmadkhan Hanifkhan Pathan & anr:*** *Criminal Revision Applications 313 & 314/1997 decided on 17.1.2007 (Bombay High Court);*

(iv) ***Shamim Ara v. State of U.P.: AIR 2002 SC 355***.

(2) Consequently, the complainant continued to be the petitioner's wife. Therefore, there was no question of any rape during 13.4.2006 and 19.4.2006 inasmuch as a "wife" is excepted under section 375 IPC itself.

(3) In any event, the triple *talaq* pronounced in a single sitting could, at best, be regarded as one *talaq* and therefore the second *nikah* performed on 19.4.2006 was permissible and valid under muslim personal law.

(4) Consequently, consent can well be presumed for sexual acts prior to the *nikah* of 19.4.2006. Reliance was placed on ***State of Andhra Pradesh v. P Narasimha & anr: 1994 SCC (Cri) 1180***.

Five questions

12. Several questions impinging upon muslim law concepts arise for consideration. They are :-

(1) What is the legality and effect of a triple *talaq* ?

(2) Does a *talaq* given in anger result in dissolution of marriage?

(3) What is the effect of non-communication of the *talaq* to the wife?

(4) Was the purported *talaq* of October 2005 valid?

(5) What is the effect of the second *nikah* of 19.4.2006 ?

Certain Muslim Law Concepts:

13. Before I examine these questions it would be necessary to set out certain concepts of muslim law (shariat) which are oft ignored. Islamic jurisprudence (*fiqh*) has developed from four roots (*usul al-fiqh*):- (1) The *Quran*; (2) the *hadis*[3] or *sunna*; (3) *Ijma*[4]; and (iv) *Qiyas*[5]. Employing these *usul al-fiqh*, the *ulema* (the learned) conducted a scientific and systematic inquiry. This is known as the process of *ijtihad*. Through this process of *ijtihad* sprung out various schools of law each of which owed its existence to a renowned master[6]. For example, the jurisprudence (*fiqh*) developed by Abu Hanifah and continued by his disciples came to be known as the Hanafi school. The Maliki school owed its origin to Malik b. Anas, the Shafie school to al-Shafi'i, the Hanbali school to Ibn-Hanbal and so on. These are the sunni schools. Similarly, there are shia schools such as the Ithna Ashari, Jaffariya and Ismaili schools. In India, muslims are predominantly sunnis and, by and

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3 Reports of sayings or deeds of the Prophet Muhammad.

4 Consensus of the muslim community. Shias construe *ijma* as the consensus of the *Imams*.

5 The deduction of a rule through analogies drawn from the *Quran* or the *Hadis*. Shias, however, consider systematic reasoning (*aql*) as a root in place of *qiyas*.

6 On sources of *usul-ul-fiqh* and its historical development, see *The Schools of Islamic Jurisprudence: A Comparative Study*, Mohammad Hameedullah Khan, Kitab Bhavan: New Delhi (1991), pp. 3-9. See also *Outlines of Muhammadan Law* 4th ed., Asaf A.A. Fyzee, Oxford University Press: Delhi (1974), pp. 17-22 and *The Venture of Islam*, Marshall G. S. Hodgson, The University of Chicago Press (1974), Volume 1, pp.315-358.

Regarding *ijithad*, see *The Principles of Islamic Jurisprudence*, Abdur Rahim, Kitab Bhavan: New Delhi (1994), p. 161-62.

large, they follow the hanafi school. The shias in India largely follow the Ithna Ashari school.

14. In essence, the Shariat is a compendium of rules guiding the life of a Muslim from birth to death in all aspects of law, ethics and etiquette. These rules have been crystallized through the process of *ijtihad* employing the sophisticated jurisprudential techniques. The primary source is the *Quran*. Yet, in matters not directly covered by the divine book, rules were developed looking to the *hadis* and upon driving a consensus. The differences arose between the schools because of reliance on different *hadis*, differences in consensus and differences on *qiyas* or *aql* as the case may be[7].

15. The question which arises is, given the shariat and its various schools, how does a person proceed on an issue which is in dispute? The solution is that in matters which can be settled privately, a person need only consult a *mufti* (jurisconsult) of his or her school[8]. The *mufti* gives

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[7] Hameedullah Khan, *supra*, p. 6: "The views of these schools on the fundamental principles are same but they differ from each other in certain matters of law. (subsidiary and secondary). For instance, they have different views on the authority or legality of *Ra'y* and *Qiyas*..." See also pp. 136-38.

[8] The Venture of Islam, Marshall G. S. Hodgson, The University of Chicago Press (1974), Volume 1, p.335.

his *fatwa* or advisory decision based on the Shariat of his school[9]. However, if a matter is carried to the point of litigation and cannot be settled privately then the *qazi* (judge) is required to deliver a *qaza* (judgment) based upon the Shariat[10]. The difference between a *fatwa* and a *qaza* must be kept in the forefront. A *fatwa* is merely advisory whereas a *qaza* is binding[711]. Both, of course, have to be based on the shariat and not on private interpretation *de hors* the shariat[12].

The Muslim Personal Law (Shariat) Application Act, 1937 and the various forms of dissolution of marriage recognised by it.

16. In India, the confusion with regard to application of customary law as part of muslim law was set at rest by the enactment of The Muslim Personal Law (Shariat) Application Act, 1937. Section 2 of the 1937 Act reads as under:-

> **"2. Application of Personal Law to Muslims.--** Notwithstanding any customs or usage to the

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[9] One definition of "*mufti*" and "*fatwa*" is as follows: "A *mufti* is a specialist on law who can give an authoritative opinion on points of doctrine; his considered legal opinion is called a *fatwa*." *An Introduction to Islamic Law*, Joseph Schacht, Clarendon Press: Oxford (1982), p. 73.

[10] A *qazi* (or *qadi*) is a judge appointed by the political authority or state. He or she may pass judgments in his or her jurisdiction in respect of many legal matters, including divorce, inheritance, property, contractual disputes, etc. Schacht, p. 188. A *qaza* or *kada* is a judgment, which must be given according to the *madhab* to which the *qadi* belongs. Schacht, p. 196. More information on *qazis* and *qazas* can be found at pp. 188-198.

[11] The ruling of a *qazi* settles a dispute between two parties. The ruling is binding, although if the *qazi* is not a jurist, he should on all legal questions consult a *mufti*. Abdur Rahim, p. 171-72, 370. The *fatwa* of a *mufti* is an advisory decision, while a *qaza* of a *qazi* is a binding court judgment. *The Venture of Islam: Volume 1, The Classical Age of Islam*, Marshall G.S. Hodgson, The University of Chicago Press: Chicago (1974), p. 338.

[12] Abdur Rahim, p. 172 (in respect of *qazis*)

> contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila, zihar, lian, khula* and *mubaraat,* maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*)."

The key words are "*notwithstanding any customs or usage to the contrary*" and "*the rule of decision in cases where the parties are muslims shall be the muslim personal law (shariat).*" This provision requires the court before which any question relating to, *inter-alia*, dissolution of marriage is in issue and where the parties are muslims to apply the muslim personal law (shariat) irrespective of any contrary custom or usage. This is an injunction upon the court[13]. What is also of great significance is the expression -- "*dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat..*" This gives statutory recognition to the fact that under muslim personal law, a dissolution of marriage can be brought about by various means, only one of which is

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[13] See: ***C. Mohd. Yunus v. Syed Unnissa:(1962) 1 SCR 67:-***

> "…It is expressly enacted in the Shariat Act as amended that in all questions relating to the matters specified, "the rule of decision" in cases where the parties are Muslims shall be the Muslim Personal Law. The injunction is one directed against the court: it is enjoined to apply the Muslim Personal Law in all cases relating to the matters specified notwithstanding any custom or usage to the contrary. The intention of the legislature appears to be clear; the Act applies to all suits and proceedings which were pending on the date when the Act came into operation as well as to suits and proceedings filed after that date."

talaq. Although islam considers divorce to be odious and abominable, yet it is permissible on grounds of pragmatism, at the core of which is the concept of an irretrievably broken marriage. An elaborate lattice of modes of dissolution of marriage has been put in place, though with differing amplitude and width under the different schools, in an attempt to take care of all possibilities. *Khula*, for example, is the mode of dissolution when the wife does not want to continue with the marital tie. She proposes to her husband for dissolution of the marriage. This may or may not accompany her offer to give something in return. Generally, the wife offers to give up her claim to *Mahr* (dower). *Khula* is a divorce which proceeds from the wife which the husband cannot refuse subject only to reasonable negotiation with regard to what the wife has offered to give him in return[14]. *Mubaraat* is where both the wife and husband

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[14] *Khula* literally translates to "extinguishment" in Arabic. See *Radd-ul-Muhtar*, Vol. II, p. 916. *Khula* is mentioned in the Quran in Chapter II, verse 229, and in Chapter IV, verse 127. For a detailed explanation of *khula*, see *Muhammadan Law*, Vol. II, Syed Ameer Ali, Kitab Bhavan: New Delhi: 1996, p. 466 - 477; *Muslim Law of Marriage, Divorce and Maintenance*, M.A. Qureshi, Deep & Deep Publications: New Delhi (1992), p. 266; Fyzee, p. 163-66; *Mulla's Principles of Mahomedan Law*, 19th ed., M. Hidayatullah and Arshad Hidayatullah, N.M. Tripathi Private Ltd.: Bombay (1999), p. 265-67.

The difference between a *khula* divorce and a *mubara'a*t divorce is that in *khula* the wife desires the divorce and initiates it, while in *mubara'at* both spouses desire the separation. Mulla, p. 265. The *Hanafi* school believes that all adult females have the exclusive right to enter into a *khula*. Ameer Ali, p. 469. "Wife's right to *khula* is parallel to the man's right of *talaq*. Like the latter the former too is unconditional. It is indeed a mockery of the *Shariat* that we regard *khula* as something depending either on the consent of the husband or on the verdict of the *qazi*. The law of Islam is not responsible for the way Muslim women are being denied their right in this respect." Syed Abdul A'la Maududi, in *Huquq-uz-Zaujain*, 9th ed., Lahore 1964 pp 61, 77-79, translated from Urdu in *The Muslim Law of India*, 3rd ed., Tahir Mahmood, Lexis Nexis Butterworths: New Delhi (2002), p. 99.

Although a *khula* is effective once the spouses agree to the amount that will be given to the husband, usually the amount of the *mahr* (dower) that he gave her at the time of their *nikah*

decide to mutually put an end to their marital tie. Since this is divorce by mutual consent there is no necessity for the wife to give up or offer anything to the husband. It is important to note that both under *khula* and *mubaraat* there is no need for specifying any reason for the divorce. It takes place if the wife (in the case of *khula*) or the wife and husband together (in the case of *mubaraat*) decide to separate on a no fault/no blame basis. Resort to *khula* (and to a lesser degree, *mubaraat*) as a mode of dissolution of marriage is quite common in India.

17. *Ila*[15] and *Zihar*[16] as modes of divorce are virtually non-existent in India. However, *lian* is sometimes resorted to. If a man accuses his wife of adultery (*zina*), but is unable to prove the allegation, the wife has the right to approach the *qazi* for dissolution of marriage. In India, a regular suit has to be filed. Once such a suit is filed by the wife, the husband has the option of retracting his charge of adultery, whereupon the suit shall fail. However, if he persists then he is required

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(marriage), *iwaz* (return) is not compulsory for the *khula* to take effect. Mahmood, p. 98; Fyzee, p. 164-65, Ameer Ali, p. 468. The consideration in the *khula* is usually part of or the whole mahr. Fyzee, p. 163.

[15] *Ila'* is mentioned in the Shariat Act of 1937. In *ila'* the husband swears not to have sexual intercourse with his wife and must abstain for at least four months, after which the marriage is automatically dissolved, according to *Hanafi* law. *Ithna Asharis* and *Shafi'is* require a legal proceeding, however. Fyzee, p. 162.

[16] *Zihar* is also mentioned in the Shariat Act of 1937. In *zihar* the husband swears that his wife is like "the back of his mother" to him. After the husband has said this on oath, the wife has the right to go to court and obtain a divorce decree or restitution of conjugal rights. Fyzee, p. 162.

to make four oaths in support of the charge. The wife makes four oaths of her innocence, after which the court declares the marriage dissolved. This is the process of dissolution of marriage by *lian*[17].

The Dissolution of Muslim Marriage Act, 1939

18. At this juncture it would be relevant to mention the Dissolution of Muslim Marriages Act, 1939 which enabled muslim women of all sects to seek dissolution of marriage by a decree of the court under the various grounds enumerated in section 2[18] thereof which

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[17] See Fyzee, pp. 166-68; Ameer Ali, pp. 484-87; Mulla, pp. 273-74

[18] **"2. Grounds for decree for dissolution of marriage** .-- A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(*i*) that the whereabouts of the husband have not been known for a period of four years;

(*ii*) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(*iii*) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(*iv*) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(*v*) that the husband was impotent at the time of the marriage and continues to be so;

(*vi*) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(*vii*) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

(*viii*) that the husband treats her with cruelty, that is to say, --

(*a*) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(*b*) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(*d*) disposes of her property or prevents her exercising her legal rights over it, or

included the husband's cruelty, impotency, failure to maintain, leprosy, virulent venereal disease, etc.. Section 2(*ix*) of the 1939 Act contained the residuary clause entitling a muslim woman to seek dissolution of her marriage through a court on any other ground which is recognised as valid for the dissolution of marriages under Muslim law. So, the position after the 1937 and 1939 Acts is that dissolution of a muslim marriage is permissible by the modes of *talaq*, *ila, zihar, lian, khula* and *mubaraat* (as mentioned in the 1937 Act) as also on a wife's suit under the 1939 Act, on any of the grounds mentioned therein or on any other ground which is recognised as valid for the dissolution of marriages under Muslim law which would include *lian*. Divorce through *talaq*, *ila, zihar, khula* and *mubaraat* takes place without the intervention of the court. Divorce under the 1939 Act (which would also include *lian*) is through a wife's suit and by a decree of the court. The muslim wife, therefore, can

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(*e*) obstructs her in the observance of her religious profession or practice, or

(*f*) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(*ix*) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that --

(*a*) no decree shall be passed on ground (*iii*) until the sentence has become final;

(*b*) a decree passed on ground (*i*) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground (*v*) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground."

seek divorce either outside the court (through *khula*) or through court (under the 1939 Act or *lian*). She can also put an end to the marital tie by pronouncing *talaq* upon herself in the case of *talaq-e-tafwiz* where the husband delegates the power of pronouncing *talaq* to his wife. On the other hand, the muslim husband can dissolve the marriage only outside court through *talaq* (*ila* and *zihar* being virtually non-existent in India). Both the husband and wife can mutually decide to dissolve the marriage, again without the intervention of court, through *mubaraat*.

19. The 1939 Act introduced a very salutary principle into muslim law as it is administered in India. This is the principle of applying beneficial provisions of one school to adherents of other schools as well. The Statement of Objects and Reasons[19] of the 1939 Act clearly indicates the application of *Maliki* law to all muslim women seeking divorce through court. It was specifically noted in the said Statement of Objects

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[19] The relevant portion of the Statement of Objects and Reasons is as under:

"There is no proviso in the Hanafi Code of Muslim Law enabling a married Muslim woman to obtain a decree from the court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the "Maliki, Shafi'i or Hambali Law". Acting on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in clause 3, Part A of this Bill (now see Section 2 of the Act), a married Muslim woman may obtain a decree dissolving her marriage .... As the courts are sure to hesitate to apply the Maliki Law to the case of a Muslim woman, legislation recognizing and enforcing the above-mentioned principle is called for in order to relieve the sufferings of countless Muslim women."

and Reasons that "*the Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafii or Hambali Law*".

Talaq **and its three forms**

20. I now return to the central point in this case – *talaq*. This mode of dissolving a marriage is unique to muslim law. In this connection the Supreme Court, in ***Zohara Khatoon v. Mohd. Ibrahim: (1981) 2 SCC 509***, observed :-

> "**19.** There can be no doubt that under the Mahomedan law the commonest form of divorce is a unilateral declaration of pronouncement of divorce of the wife by the husband according to the various forms recognised by the law. A divorce given unilaterally by the husband is especially peculiar to Mahomedan law. In no other law has the husband got a unilateral right to divorce his wife by a simple declaration because other laws viz. the Hindu law or the Parsi Marriage and Divorce Act, 1936, contemplate only a dissolution of marriage on certain grounds brought about by one of the spouses in a Court of law."

Three forms of *talaq* have been in existence – (1) *Ahsan talaq*; (2) *Hasan talaq*; and (3) *Talaq-e-bidaat*.

21. *Ahsan talaq*[20]*:* When the husband makes a single pronouncement of *talaq* during a period of purity (*tuhr*) followed by abstinence from sexual intercourse for the period of *iddat*[21], such a *talaq* is called *ahsan talaq.* A divorce of this kind is revocable during the period of *iddat.* It becomes irrevocable when the period of *iddat* expires. It is irrevocable in the sense that the former husband and wife cannot resume a legitimate marital relationship unless they contract a fresh *nikah* with a fresh *mahr*[22]. This is subject to a limitation and that is that if the *talaq* was the third time such a *talaq* was pronounced, then they cannot re-marry unless the wife were to have, in the intervening period, married someone else and her marriage had been dissolved either through divorce or death of that person and the *iddat* of divorce or death has expired. This

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[20] *Ahsan talaq* is the most approved or most proper, while *hasan talaq* is approved or proper. In other words, *ahsan talaq* is preferred over *hasan talaq*. *Ahsan talaq* is described in the following: Mulla, p. 261-62; Ameer Ali, p. 435-36; Fyzee, p. 151-52; Qureshi, p. 215-16.

[21] The *iddat* (or *idda*) period is described in Fyzee, p. 152, as follows: "This period is three months from the date of the declaration or, if the woman is pregnant until delivery. The husband may revoke the divorce at any time during the '*idda*...After the expiration of the *'idda* the divorce becomes irrevocable. A Muslim wife, after divorce, is entitled to maintenance during the '*idda*, and so also her child, in certain circumstances."

[22] *Mahr* is the dower given to the Muslim wife by the husband. The amount of the *mahr* is generally stated in the *nikahnama*, or marriage contract. It may either be fixed or not, as long as it is not below the minimum amount, which varies from one school of jurisprudence to another. Fyzee, p. 134; Ameer Ali, p. 392-93; Mulla, p. 245-46 (Giving the *Hanafi* minimum amount); Abdur Rahim, p. 318. Often *mahr* is misconstrued to function as consideration in the Islamic marriage contract. However, as Abdur Rahim suggests, *mahr* is not consideration to effectuate the marriage, but is given as a "mark of respect for the wife" p. 318. Sharing a similar view Dr Tahir Mahmood observes: "The Islamic concept of *maher* has been widely misunderstood. Those who are obsessed with the contractual element in the Muslim concept of marriage regard it as consideration; those more familiar with dowry confuse it with the same. The fact is that *maher* is neither consideration nor dowry; it has a unique position of its own." *The Muslim Law of India*, 3rd ed., Tahir Mahmood, Lexis Nexis Butterworths: New Delhi (2002) p.66.

latter process is known as *halala*[23]. However, the process of *halala* cannot be employed as a device to re-marry the same spouse but, it must happen in the natural course of events. It is, in effect, a near impossibility and, for all intents and purposes, the third *talaq* brings about a final parting of the erstwhile spouses.

22. *Hasan talaq*[24]*:* Where the husband makes a single pronouncement of divorce during three successive *tuhrs*, without any sexual intercourse during the said *tuhrs,* the divorce is known as *hasan talaq*. The first two pronouncements are revocable. The third is irrevocable. The first two pronouncements can be revoked during *iddat*. The third, cannot be. And, after *iddat,* the former husband and wife cannot even enter into a *nikah* unless the said process of *halala* is completed.

23. *Talaq-e-bidaat*[25]*:* Where three pronouncements are made in one go (triple *talaq*) either in one sentence or in three sentences

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[23] Mulla, p. 276; Ameer Ali, p. 458-59; Fyzee, p. 186

[24] Fyzee, p. 151, 153-54; Ameer Ali, p. 436; Qureshi, p. 215-216.; Mulla, p. 261-62.

[25] *Bidaat or Bid'at* means innovation in Arabic. *Talak-ul-bid'at* or *talaq-e-biddat* is a form of divorce that is not described in the *Quran* or *Sunnah*, i.e. it is "irregular" or "heretical." This type of *talaq* is described in the following: Fyzee, p. 151, 154-55; Ameer Ali, p. 435, 436; Mulla, p. 261-62. These sources take the Indian *Hanafi* view that triple *talaq* is a sinful yet effective form of divorce.

signifying a clear intention to divorce the wife, for instance, the husband saying "I divorce you three times" or "I divorce you, I divorce you, I divorce you" or the much publicised "*Talaq, talaq, talaq*".

Sanctity and effect of *Talaq-e-bidaat* or triple *talaq*.

24. There is no difficulty with *ahsan talaq* or *hasan talaq*. Both have legal recognition under all *fiqh* schools, *sunni* or *shia*. The difficulty lies with triple *talaq* which is classed as *bidaat* (an innovation). Generally speaking, the *shia* schools do not recognise triple *talaq* as bringing about a valid divorce[26]. There is, however, difference of opinion even within the *sunni* schools as to whether the triple *talaq* should be treated as three *talaqs*, irrevocably bringing to an end the marital relationship or as one *rajai* (revocable) *talaq*[27], operating in much the same way as an *ahsan talaq*.

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[26] With regard to triple *talaq*, Fyzee comments: "Such a *talaq* is lawful, although sinful, in *Hanafi* law; but in I*thna 'Ashari* and the *Fatimid* laws it is not permissible." p. 154. Ameer Ali notes: "The *Shiahs* and the *Malikis* do not recognise the validity of the *talak-ul-bid'at*, whilst the *Hanafi* and the *Shaf'eis* agree in holding that a divorce is effective, if pronounced in the *bid'at* form, "though in its commission the man incurs a sin." p. 435. These statements may not be accurate as to the views of *Malikis* and *Shaf'eis*, but it is universally recognized that the above-mentioned *Shi'a* schools do not find triple *talaq* to be a valid form of divorce.

[27] Classical *Hanafi* law, especially as it is practiced in India, seems to take the opinion that triple *talaq* is sinful yet effective as an irrevocable divorce. See, e.g., Mulla p. 261-62; *The Hedaya*, p. 72-73, 83. On the other hand, Ameer Ali suggests that a triple *talaq* can be revoked within the *iddat* period. p. 436. Maulana 'Umar Ahmad 'Usmani, in *The Quran, Women and Modern Society*, by Asghar Ali Engineer, New Dawn: New Delhi (2005), states that Muhammad ibn Muqatil, a *Hanafi* jurist, gave evidence indicating that Imam Abu Hanifa developed a second opinion that a triple *talaq* constitutes one *talaq* and that it can therefore be revoked within the *iddat* period. Maulana 'Umar Ahmad 'Usmani quotes from *Fath al-Bari* by Hafiz Ibn Jahar al-Asqalani, who states that

25. When a difference of opinion is discernible within a particular school, normally the dominant opinion is taken as representative of the

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many eminent jurists have held the opinion that three *talaqs* pronounced in one sitting constitute only one *talaq*. Maulana Wahiduddin Khan, in *Concerning Divorce*, Goodword Books: New Delhi (2003), p. 29, says that in the case of a man who was "emotionally overwrought" when pronouncing *talaq* three times, "His three utterances of the word *talaq* may be taken as an expression of the intensity of his emotions and thus the equivalent of only one such utterance." He further gives the example of a *Hadith* recorded by Imam Abu Dawud in which Rukana ibn Abu Yazid said "*talaq*" to his wife three times in one sitting, and then regretted his action. When he told the Prophet Muhammad (peace be upon him) how he had divorced his wife, the Prophet (pbuh) observed, "All three count as only one. If you want, you may revoke it." p. 28-29 (original *Hadith* found in *Musnad Ahmad ibn Hanbal*). There is also a *Hadith* reported by Abdullah ibn Abbas that in the Prophet's (pbuh) lifetime, during the caliphate of Abu Bakr, and during the first two years of Umar ibn al-Khattab's caliphate, triple *talaq* was counted as one *talaq* only, but that Umar then made triple *talaq* binding upon his people so that they learned the consequences of their hasty actions. *Sahih Muslim* 3491. Maulana Wahiduddin Khan observes this rule was of a "temporary nature" and was specific to the people of the time, and that the *'ijma* of the Companions on Umar's decision was also temporary, as *'ijma* cannot override the system of divorce prescribed in the *Quran*. p. 30, 32. He notes that the *Shariah* is eternal, but that a Muslim ruler can make exceptions in special circumstances and can ensure that women affected by such a ruling are fully compensated. p. 30-31. He concludes that scholars today cannot justify enforcing triple *talaq* by citing Umar's ruling because they do not have the powers of a Caliph as Umar had. p. 32. It seems that modern Indian *Hanafi* scholars have taken this opinion as well: the *Compendium of Islamic Laws*, 2001, Part II, Section 24, states the following: "If a person pronouncing *talaq* says that he intended only a single *talaq* and repeated the words of *talaq* only to put emphasis and these words were not meant to pronounce more than one *talaq*, his statement on oath will be accepted." Translated by Mahmood. (Also see: *The Muslim Law of India*, 3rd ed., Tahir Mahmood, Lexis Nexis Butterworths: New Delhi (2002),p.107, where the learned author noted: "In India there has been no legislation in this regard, but the *muftis* of the time now agree that if a man pronounces the so-called "triple *talaq*" but later swears that he did not mean it, his declaration may be given the effect of a single *talaq* revocable during *iddat* and, if not so revoked, leaving room for a fresh *nikah* thereafter with the wife's consent"). Such a view is, perhaps, based upon an application of the following legal maxim of Islamic law – *Al-umuru bi-maqasidiha* : Acts are judged by the intention behind them.

Sheikh Sayyed Sabiq in *Fiqh As-Sunnah* states on the subject of triple *talak* that although the majority opinion is that triple *talak* will count as three divorces, other scholars such as Ibn Taymiyyah and Ibn al-Qayyim, as well as Companions like 'Ata', Tawuus, Ibn Dinar, 'Ali ibn Abi Talib, Ibn Mas'ud, 'Abdur-Rahman ibn 'Awf, Az-Zubayr, were of the opinion that it counts as only one pronouncement of divorce. He then says, "This latter view is believed to be the most correct." Some go as far as to argue that there is *ijma'* that triple *talak* counts as three *talaks*. However, according to the requirements for *ijma'* (in the *Hanafi madhab*), "no opinion to the contrary should have been expressed on the question by any of the Companions, or by other *Mujtahids* before the formation of the *Ijma'*," and "none of the *Mujtahids* taking part in the decision should have afterwards changed his opinion." Abdur Rahim, p. 145. Here, the first condition is certainly not met, and the second is arguably not met. Finally, many Muslim countries, including Algeria, Egypt, Jordan, Morocco, Sudan, Syria, and Yemen, have implemented laws that uphold the notion that a triple *talak* counts as only one *talak*. P*ersonal Law in Islamic Countries*, Tahir Mahmood, Academy of Law and Religion: New Delhi (1987).

school. But, this does not mean that a *qazi,* when required to render a decision in a specific case, cannot, in the interest of justice and equity, adopt the view of the minority within the school[28]. It is also interesting to note that traditionally the *qazi* gave the ruling based upon the school which he followed[29]. So, if he was a follower of the *hanafi* school he decided cases on the basis of *hanafi fiqh*. Consequently, if a dispute were to be brought to a *qazi* who followed *shafei fiqh* he would decide according to *shafei* precepts. In India, the secular courts while applying muslim law to muslims in accordance with section 2 of the 1937 Act have adopted the principle of applying the *fiqh* to which the parties belong[30]. Meaning thereby, that *hanafi* principles would be applied to adherents of the *hanafi* school and *ithna ashari* law to *ithna asharis* and so on. This, however, has not been strictly followed, perhaps in ignorance. Clearly, a *qazi* or a judge is permitted to apply a minority view within a school of

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[28] Abdur Rahim p. 173-74. The Islamic Fiqh Academy of India has said that scholars and jurists may take the opinions of other *madhaahib* besides their own due to "changing times and circumstances" if the opinion of another *madhab* is more "in tune with prevailing conditions." *Juristic Decisions on Contemporary Issues*, IFA Publications: New Delhi (2005). Such views are based on famous legal maxims such as "Harm must be eliminated" (*Ad-dararu yuzal*). See Mohammad Hashim Kamali, Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law, The Association of Muslim Lawyers (UK).

[29] See *supra*, fn 9, Schacht, p. 196.

[30] The Muslim Personal Law (SHARIAT) Application Act, 1937, Section 2: "Notwithstanding any customs or usage to the contrary, in all questions save questions relating to agricultural land regarding interstate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including Talaq, Ila, Zihar, Lian, Khula and Mubaraat, maintenance, dower, guardianship, gifts, trust and trust properties and wakfs (other than charities and charitable and religious endowments) *the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (SHARIAT).*"

fiqh to adherants of that school. He is also permitted to apply a view taken by a school of law of which the parties are not members of. This can be done in the interest of justice and equity and to avoid hardship to any one or both the parties provided, of course, that what the judge proposes to do is not contrary to a basic tenet of Islam or the Quran or a ruling or saying or act of prophet Muhammad.

26. It is accepted by all schools of law that *talaq-e-bidaat* is sinful[31]. Yet some schools regard it as valid. Courts in India have also held it to be valid. The expression – bad in theology but valid in law – is often used in this context. The fact remains that it is considered to be sinful. It was deprecated by prophet Muhammad[32]. It is definitely not recommended or even approved by any school. It is not even considered to be a valid divorce by *shia* schools. There are views even amongst the *sunni* schools that the triple *talaq* pronounced in one go would not be regarded as three *talaqs* but only as one. Judicial notice can be taken of the fact that the harsh abruptness of triple *talaq* has brought about extreme misery to the divorced women and even to the men who are left with no chance to undo the wrong or any scope to bring about a

[31] See *supra,* fn 25 & 26, for the opinion of the *Hanafi madhab* that triple *talaq* is sinful.

[32] Once the Prophet (pbuh) was informed about a man who had pronounced three divorces at one time. He got up in anger, saying, "Is sport being made of the Book of Allah while I am (yet) among you?" Reported by an-Nasai'i.

reconciliation. It is an innovation which may have served a purpose at a particular point of time in history[33] but, if it is rooted out such a move would not be contrary to any basic tenet of Islam or the Quran or any ruling of the Prophet Muhammad.

27. In this background, I would hold that a triple *talaq* (*talaq-e-bidaat)*, even for *sunni* muslims be regarded as one revocable *talaq*. This would enable the husband to have time to think and to have ample opportunity to revoke the same during the *iddat* period. All this while, family members of the spouses could make sincere efforts at bringing about a reconciliation. Moreover, even if the *iddat* period expires and the *talaq* can no longer be revoked as a consequence of it, the estranged couple still has an opportunity to re-enter matrimony by contracting a fresh *nikah* on fresh terms of *mahr* etc.

Importance of the attempt at reconciliation

28. The attempt at reconciliation which is recommended under the shariat, has been assigned a key role by the Supreme Court. This, we

[33] The exact *Hadith* is as follows: "Abdullah ibn Abbas reported that the pronouncement of three divorces during the lifetime of Allah's Messenger (pbuh) and that of Abu Bakr and two years of the caliphate of Umar was treated as one. But Umar ibn al-Khattab said, "Verily the people have begun to hasten in the matter in which they are required to observe respite. So if we had imposed this upon them, [it would have deterred them from doing so!] and he imposed it upon them." *Sahih Muslim* 3491.

shall see presently. It all began with the decision of Baharul Islam J. of the Gauhati High Court in a case under section 125 CrPC for maintenance by a "wife" in ***Sri Jiauddin v. Mrs Anwara Begum:*** ***(1981) 1 Gauhati Law Reports 358***. When the "wife" (Anwara Begum) filed the petition for maintenance, Jiauddin alleged in his written statement before the Magistrate that he had pronounced *talaq* earlier and that Anwara Begum was no longer his wife. No evidence of the pronouncement of *talaq* was produced. When the matter reached the High Court, the question was -- whether there had been a valid *talaq?* Baharul Islam J. observed that while a muslim marriage was a civil contract, a high degree of sanctity attached to it. The necessity of dissolution was recognized but, only under exceptional circumstamces. He held that :-

> " 'talaq' must be for reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters – one from the wife's family the other from the husband's. If the attempts fail, talaq may be effected."

29. In arriving at this conclusion, Baharul Islam J. considered various verses[34] of the Quran and opinions of scholars and jurists such as Mohammad Ali, Yusuf Ali, Ameer Ali and Fyzee. The learned Judge went on to hold:-

[34] Sura IV, verses 128 – 130; Sura II, verses 229 – 232; and Sura IV, verse 35.

> "… In other words, an attempt at reconciliation by two relatives – one each of the parties, is an essential condition precedent to 'talaq'."

30. In a subsequent decision of a Division Bench (Baharul Islam CJ & D. Pathak J.) of the Gauhati High Court in the case of ***Mst Rukia Khatun v. Abdul Khalique Laskar:*** ***(1981) 1 Gauhati Law Reports 375***, the decision in ***Jiauddin*** *(supra)* was held to have correctly laid down the law on the subject and the decisions of the Calcutta and Bombay High Courts in ***ILR 59 Calcutta 833***[35] and ***ILR 30 Bombay 537***[36] were observed to be not correct law. In ***Rukia Khatun*** *(supra)*, the said Division Bench held:-

> "In our opinion the correct law of 'talaq' as ordained by Holy Quran is: (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be preceded by an attempt at reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected."

31. Now I come to the decision of the Supreme Court in ***Shamim Ara v. State of U.P.:*** ***AIR 2002 SC 3551*** which was also a case arising out of an application for maintenance under section 125 CrPC filed by a

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[35] ***Ahmed Kasim Molla v. Khatun Bibi***, where Costello J. held: "Upon that point, there are a number of authorities and I have carefully considered this point as dealt with in the very early authorities to see whether I am in agreement with the more recent decisions of the courts. I regret that I have come to the conclusion that as the Law stands at present, *any Mahomedan may divorce his wife at his mere whim and caprice.*"

[36] ***Sarabai v. Rabiabai***, where Batchelor J. held: "it is good in law, though bad in theology."

"wife". To avoid the payment of maintenance, the husband had taken the plea in his written statement that he had already divorced her by pronouncing *talaq*. The Supreme Court referred to the two decisions of the Gauhati High Court in ***Jiauddin*** *(supra)* and ***Rukia Khatun*** *(supra)* and expressed its agreement with the abovementioned observations made in those judgments. Thereafter, examining the facts of the case before it, the Supreme Court noted that no evidence in proof of the alleged *talaq* had been adduced by the husband and that there were "*no reasons substantiated in justification of talaq and no plea or proof that any effort at reconciliation preceded the talaq*". The Supreme Court held that a talaq has to be pronounced to be effective. It said:-

> "A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on wife on the date of the filing of the written statement in the court followed by delivery of a copy thereof to the wife."

32. In these circumstances[37], the Supreme Court held that the marriage was not dissolved and that the liability of the husband to pay maintenance continued. Thus, after ***Shamim Ara*** *(supra)*, the position of the law relating to *talaq*, where it is contested by either spouse, is that, if

[37] The circumstances being – (1) no evidence of pronouncement of *talaq*; (2) no reasons in justification of *talaq*; and (3) no plea or proof that *talaq* was preceded by efforts towards reconciliation.

it has to take effect, first of all the pronouncement of *talaq* must be proved (it is not sufficient to merely state in court in a written statement or in some other pleading that *talaq* was given at some earlier point of time), then reasonable cause must be shown as also the attempt at reconciliation must be demonstrated to have taken place. This would apply to *ahsan talaq*, *hasan talaq* as also *talaq-e-bidaat*[38]. The latter, also because of the view taken by me that a *talaq-e-bidaat* or triple *talaq* (so called) shall be regarded as one revocable *talaq.* An issue which needs to be un-knotted is – does the attempt at reconciliation necessarily have to precede the pronouncement of *talaq* or can it be after the pronouncement also? The two Gauhati High Court decisions and that of the Supreme Court in ***Shamim Ara*** *(supra)* have gone on the understanding that the attempt at reconciliation must precede the pronouncement of *talaq* itself. But, those decisions did not consider the distinction between a revocable and an irrevocable *talaq*. Those decisions, in my respectful view, proceeded on the basis that the *talaq* in each of the cases was of an irrevocable nature. Once a *talaq* is of the irrevocable kind, it is obvious that the effort at reconciliation must

[38] With respect, I do not agree with the exception carved out by the Bombay High Court in ***Dagdu Chotu Pathan*** *(supra)[see: paragraphs 24 & 32 thereof]* that the conditions precedent of specific reasons for divorce and attempt at reconciliation do not apply in the case of a triple *talaq* . The said decision was relied upon by the learned counsel for the petitioner. But, I find that, though it contains portions which help the petitioner, it also contains portions which do not correctly state the law on the concepts of muslim law. The same is the case with ***Riaz Fatima*** *(supra)*. As such, no reliance can be placed on those decisions. The position of law is clearly stated in the two Gauhati High Court decisions and by the Supreme Court in ***Shamim Ara*** *(supra)*.

precede its pronouncement. But, where a *talaq* is revocable, the attempts at reconciliation can take place even after the pronouncement. This is so, because, in a revocable *talaq*, the dissolution of marriage does not take place at the time of pronouncement but is automatically deferred till the end of the *iddat* period. This duration is specifically provided so that the man may review his decision and a reconciliation can be attempted. A *hasan talaq* is revocable. So also are the first two *talaq* pronouncements in the case of *ahsan talaq*. Now, *talaq-e-bidaat* has also been held by me to be operative as a single revocable *talaq*. In all these cases of revocable *talaq*, the attempt at reconciliation may, in my view, take place after the pronouncement of *talaq*. The crucial point is that for a pronouncement of *talaq* to result in the dissolution of the marital tie there must be an attempt at reconciliation. In the case of an irrevocable *talaq*, it must precede the pronouncement and in the case of a revocable *talaq*, it may precede or it may be after the pronouncement but before the end of the *iddat* period.

Pronouncement of *talaq* and dissolution of marriage

33. In this connection it would be relevant to note that pronouncement of *talaq* does not *ipso facto* amount to a dissolution of the marital tie between husband and wife. Some assistance may be taken of traditional English law in explaining the concept. As indicated in Jowitt's

dictionary of English Law, Edition-II, Sweet & Maxwell, divorce was a term used by the ecclesiastical courts to signify an interference by them with the relation of husband and wife. It was of two kinds — a divorce *a mensa et thoro* (from bed and board), granted in cases where the husband or wife had been guilty of such conduct as to make conjugal intercourse impossible (as in the case of adultery, cruelty, etc.); and a divorce *a vinculo matrimonii* (from the bond of marriage), granted where the marriage was voidable or void *ipso jure* (as in the case of the parties being within the prohibited degrees, or one of them having been already married, or being impotent when married). The former is now represented by judicial separation, the latter by a decree of nullity of marriage.

34. In Halsbury's Law of England, Fourth Edition, Volume 13, in paragraphs 501 and 502 it is mentioned that the law relating to matrimonial causes was much influenced by the ecclesiastical canons and former practice of the ecclesiastic courts. That influence gradually diminished, and modern legislation has very considerably cut it down. It was also noted that from the middle of the twelfth century the ecclesiastic courts were recognized as having exclusive jurisdiction in matters of marriage and divorce, as that term was then understood, and since the

Church of Rome was the supreme ecclesiastic authority in England the ecclesiastic courts applied the canon law in matrimonial causes. Christian marriage was indissoluble, but divorce *a mensa et thoro,* in the nature of the present day judicial separation, that is divorce without the right thereafter to marry another person while the former spouse still lives, was granted for certain causes. Subsequently, there developed in course of time a method of divorce *a vinculo matrimonii,* that is divorce in its current meaning of dissolution with the right thereafter to marry another person while the former spouse still lives. It was also noted that after the enactment of Matrimonial Causes Act, 1857 in England, divorce means dissolution of marriage with the right thereafter to marry another person while the former spouse still lives.

35. From the above discussion, it is clear that the marital relations between husband and wife under English law could be interfered with by way of judicial separation, annulment of marriage or dissolution of marriage. The last of the expressions has now become synonymous with the word "divorce". It is, however, important to note that traditional divorce included the concept of judicial separation without resulting in a dissolution of marriage. Principles under Muslim Law are somewhat different from the straightforward classification of a divorce implying

dissolution of marriage. When a *talaq* is pronounced, the marital relationship may not terminate immediately. If the *talaq* is revocable then the same can be revoked during the *iddat* period. If it is so revoked, then the marital tie between the husband and the wife is not severed and no dissolution of marriage takes place. However, if the *talaq* is not revoked during the period of *iddat,* then upon the termination of such period, dissolution of marriage takes place. During the period of *iddat,* under Muslim Law, the wife upon whom *talaq* has been pronounced, has the right of residence as well as of maintenance and she cannot be disturbed from where she was residing at the time of pronouncement of *talaq*. She continues to be the wife of the petitioner for the entire duration of the period of *iddat* and, therefore, her status would be akin to that of a wife under traditional English law in the case of divorce *a mensa et thoro*. The dissolution of marriage takes place only upon the completion of the *iddat* period provided the *talaq* is not revoked. It is then that the parties are released from their marital bond and a divorce *a vinculo matrimonii* takes place amounting to dissolution of marriage. These are also important factors to be kept in mind while construing the question of divorce under Muslim Law. It is, therefore prescribed that the period during which the marital tie remains in suspense ought to be utilized for the purposes of bringing about a reconciliation between the

husband and the wife and it is for this purpose that the courts have recognized that a reconciliation must be attempted in the manner indicated in the *Quran.*

Can talaq be pronounced in the absence of the wife?
Is communication of the pronouncement of talaq necessary?

36. The Supreme Court made it clear in ***Shamim Ara*** *(supra)* that a *talaq,* to be effective, has to be pronounced. The manner of pronouncement of oral *talaq* also brings in differences in *hanafi* and *ithna ashari* schools. For one, the latter requires the presence of two competent witnesses, while the former does not. Then there is the issue of communication. A *talaq* may be pronounced in the absence of the wife[39]. But, does it not need to be communicated to her? As discussed above, pronouncement of *talaq* materially alters the status of the wife. Her rights and liabilities flow from the nature of the *talaq.* Is it a revocable *talaq* or is it an irrevocable *talaq*? Then there is the question of *iddat*. Her right to residence. Her right to maintenance. Her right to *mahr* (if deferred). Custody of children, if any. Her right of pledging her

[39] See: ***Ful Chand v. Nazab Ali Chowdhary:*** ***(1908) I.L.R. 36 Cal. 185***: "We therefore hold that it is not necessary for the wife to be present when the *talak* is pronounced. It is necessary certainly for the purpose of dower that the fact of pronouncement of *talak* should come to her notice."

Also see: ***Kathiyumma v. Urathel Marakkar:*** ***AIR 1931 Madras 647***: "It is now settled law that the absence of the wife does not make the pronouncement of talak void and inefficacious, for the husband may pronounce a valid talak in her absence."

husband's credit for obtaining the means of subsistence. How would she know that it is time for her to exercise these rights (or time for her not to exercise them, as in the case of pledging her husband's credit) if she does not even know that her husband has pronounced *talaq*? So, linked with the question of her rights is the issue of communication of the *talaq* to her? Furthermore, as pointed out above, the *iddat* period, in the case of a revocable *talaq,* is also a period during which the husband and wife have a re-think and attempt reconciliation. How would this be possible if the husband pronounces *talaq* secretly and does not at all inform the wife about it? Consequently, while it may not be essential that the *talaq* has to be pronounced in the presence of the wife, it is essential that such pronouncement, to be effective, is made known to her, communicated to her[39], at the earliest. Otherwise she would be deprived of her rights post *talaq* and pre-dissolution. What is the earliest will depend on the facts and circumstances of each case and would necessarily be a function of the access to communication that the husband and wife have. In the modern day, where every nook and cranny has landline or cellular coverage, in almost every case it would mean the same day. To my mind,

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[39] See: fn 38. And see: ***Kathiyumma*** *(supra)* to the following effect: "It is a part of the Mahomedan law that, so far as a claim for dower is concerned, the marriage is dissolved by divorce only when it comes to the wife's notice."

Also see: ***M. M. Abdul Khader v. Azeeza Bee:*** ***AIR 1944 Madras 227*** wherein it was held that *talaq* pronounced in the absence of the wife would be valid but, it would be effective only on the date the wife comes to know of the pronouncement of *talaq* be her husband.

communication is an essential element of pronouncement. Where the pronouncement of *talaq* is made in the presence of the wife, the acts of pronouncement and communication take place simultaneously. The act of pronouncement includes the act of communication. Where the wife is not present, pronouncement and communication are separated by time. The pronouncement would be valid provided it is communicated to the wife. The *talaq* would be effective from the date the pronouncement is communicated to the wife. In case it is not communicated at all, even after a reasonable length of time, a vital ingredient of pronouncement would be missing and such a *talaq* would not take effect.

The answers to the five questions

37. *(1) What is the legality and effect of a triple talaq ?*

It is not even considered to be a valid divorce by *shia* schools. I hold that a triple *talaq* which is *talaq-e-bidaat*, even for *sunni* muslims be regarded as one revocable *talaq*.

(2) Does a talaq given in anger result in dissolution of marriage ?

If a *talaq* is pronounced in extreme anger where the husband has lost control of himself it would not be effective or valid[40].

[40] See: *Compendium of Islamic Laws*, 2001, Part II, Chapter 2, Section 9: "A talaq pronounced in

(3) What is the effect of non-communication of the talaq to the wife?

If the pronouncement of *talaq* is communicated to the wife, the *talaq* shall take effect on the date it is so communicated. However, if it is not communicated at all the *talaq* would not take effect.

(4) Was the purported talaq of October 2005 valid?

No. First of all, it was given, if at all, in extreme anger. Secondly, it was never communicated to the complainant, at least not by the relevant period (i.e., till 13.04.2006 or even by 19.04.2006). Thirdly, there was no attempt at reconciliation in the manner suggested in the Quran either before or after the purported pronouncement of *talaq* in October 2005. Consequently, the marital tie of the petitioner and the complainant subsisted during the relevant period (ie., 13.04.2006 to 19.04.2006). Therefore, the offence of rape is not made out even on the basis of allegations contained in the complaint.

(5) What is the effect of the second nikah of 19.4.2006 ?

It was not necessary. Since the marriage was subsisting, the second *nikah* between them would be of no effect. However, had the purported *talaq* of October, 2005 been valid, it would have operated as a single revocable *talaq* and it would have been permissible for the couple to re-marry. In that case, the second *nikah* would have been effective and

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anger becomes effective. However, if the anger is of such a degree that the man loses his senses and is not even able to comprehend what he is uttering, a talaq pronounced in such a state will not be effective."

valid. And, then, the presumption of consent just prior to the marriage would be available to the petitioner. But, we need not labour on that aspect as the *talaq* of October, 2005 itself was invalid and their first marriage subsisted.

Conclusion

38. In ***R.P. Kapur v. State of Punjab:*** *(1960) 3 SCR 388 : AIR 1960 SC 866* the Supreme Court summarised some categories of cases where inherent power of the High Court can and should be exercised to quash the proceedings:

> (*i*) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;
>
> (*ii*) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;
>
> (*iii*) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

The present case falls under the second category. The purported *talaq* of October 2005 was invalid as the essential ingredients of pronouncement, communication and attempt at reconciliation are absent. The petitioner and the complainant continued as husband and wife during the relevant

period (i.e., 13.04.2006 to 19.04.2006). The exception in section 375 IPC becomes applicable and, consequently, the offence of rape is not made out. Thus, apart from the ground of settlement of all matrimonial disputes, on the ground that the offence of rape itself is not made out, the FIR in question is liable to be quashed.

39. FIR No. 817/2006 registered at police station Preet Vihar under section 376 IPC stands quashed. All pending proceedings emanating from the said FIR also stand quashed. Consequently, the bail application no. 4746/2006 has become infructuous and also stands disposed of. The surety stands discharged. This petition is allowed.

BADAR DURREZ AHMED
(JUDGE)

October 3, 2007
HJ